

BOARD OF APPEALS CASE NO. 5344

*

BEFORE THE

APPLICANTS: Kinder Care, Inc.

*

ZONING HEARING EXAMINER

**REQUEST: Special Exception to operate a
kindergarten in the B3 District;
1317 Woodbridge Station Way, Edgewood**

*

OF HARFORD COUNTY

*

Hearing Advertised

*

Aegis: 4/23/03 & 4/30/03

HEARING DATE: June 4, 2003

*

Record: 4/25/03 & 5/2/03

* * * * *

ZONING HEARING EXAMINER'S DECISION

The Applicant, Kinder Care, Inc., is requesting a special exception, pursuant to Section 267-53C(7)(b) of the Harford County Code, to operate a kindergarten in a B3/General Business District.

The subject parcel is located at 1317 Woodbridge Station Way, Edgewood, MD 21040 and is more particularly identified on Tax Map 65, Grid 2D, Parcel 1018. The parcel consists of 1.120 acres, is zoned B3 and is entirely within the First Election District.

Ms. Carol Byrne appeared on behalf of the Applicant and testified that she is the Kinder Care Center Director. The property was described by the witness as exceeding 43,000 square feet with 160 feet of road frontage. The front yard depth is 100 feet and the left side yard setback is 24 feet while the right side yard setback is 28 feet. The existing building is 16 feet in height. The rear yard depth is 140 feet. The witness testified that the foregoing meet all of the specific criteria set forth in Code Section 267-53C(7)(b). The center presently accommodates 110 day care students, employs 15 staff members and utilizes 7 classrooms. The center is presently licensed for 118 children. Proposed is the addition of a kindergarten program that will accommodate 18 children. Since most of the kindergarten students will come from the existing day care population no request is being made to increase total enrollment at the center. The children are delivered to school each day and picked up via private transportation. No new employees will be added to the staff as a result of the approval and no increase in traffic is expected since the total number of students will remain the same.

Case No. 5344– Kinder Care, Inc.

The Hearing Examiner reviewed each of the “Limitations, Guides and Standards” set forth in Section 267-9I of the Harford County Code with the witness who testified that no adverse impacts would result to adjacent properties as a result of a kindergarten use at this location. The neighboring properties presently include an office use and the Aberdeen Proving Ground Federal Credit Union (APFCU) office. No changes to the physical plant are anticipated and the witness felt that no visible changes to the property would be noticeable if the approval for the kindergarten were granted.

Mr. Anthony McClune appeared as representative of the Department of Planning and Zoning. McClune pointed out that the existing daycare use is a principal permitted use in this zone. Further, McClune agreed that the Applicant will meet or exceed each of the specific requirements of the Code regarding the Special Exception use. As set forth in Section 267-53C(7)(b). The witness described the two roads that access the property and testified that no increase in traffic would result from approval of the subject request. The use, according to the Department, is consistent with the Master Plan, the Master land Use Plan and with sound zoning and planning principles and practices. There will be no discernible differences in the property or uses thereon after the kindergarten use commences, therefore, there are no additional impacts associated with the requested use and approval is recommended by the Department.

There were no persons that appeared in opposition to this request.

CONCLUSION

The Applicant, Kinder Care, Inc., is requesting a special exception pursuant to Section 267-53C(7)(b) of the Harford County Code to operate a kindergarten in a B3/General Business District.

Harford County Code Section 267-53C(7)(b) provides:

“The special exceptions enumerated herein, in addition to other conditions as may be imposed by the Board, shall comply with the following requirements:

(7) Schools, colleges and universities. These uses may be granted in any district, except the LI and GI Districts, provided that:

(b) Kindergartens must have:

Case No. 5344– Kinder Care, Inc.

- [1] A parcel area of at least twenty thousand square feet per fifteen students or fraction thereof.**
- [2] A parcel frontage of at least one hundred feet.**
- [3] A front yard depth of at least forty feet, a side yard depth equal to at least the height of the tallest institutional building located on the parcel which is proximate to the side yard and a rear yard depth of at least forty feet.”**

Section 267-51. Purpose.

“Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.”

Section 267-52 provides as follows:

- “A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.**
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.**
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.**
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.**
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.”**

Case No. 5344– Kinder Care, Inc.

The Hearing Examiner finds, based on the facts set forth above, that the Applicant can meet or exceed each and every requirement of the Harford County Code. In addition to specific statutory requirements, Maryland Courts have had occasion to discuss the burden of proof that must be met by an applicant in a special exception case.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”).

The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” See Schultz at 432 A. 2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).

Case No. 5344– Kinder Care, Inc.

The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).

In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.” (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

Case No. 5344– Kinder Care, Inc.

In this case, there was no evidence presented by any party that would lead to the conclusion that any adverse impacts would be associated with the addition of a kindergarten use in conjunction with the existing day care use. Consequently, and in accordance with Maryland law and the Harford County Code, the Hearing Examiner recommends approval of the request subject to the following conditions:

1. The Applicant obtain a new zoning certificate for the property.
2. The approval is limited to 18 kindergarten students. Any expansion in the number of students will require further review and approval by the Board of Appeals.

Date JUNE 19, 2003

William F. Casey
Zoning Hearing Examiner